

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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In the Matter of)

Inquiry Concerning High-Speed)
Access to the Internet Over)
Cable and Other Facilities)

GEN Docket No. 00-185

COMMENTS OF CIRCUIT CITY STORES, INC.

Circuit City Stores, Inc. ("Circuit City") respectfully submits these comments in response to the Federal Communications Commission's ("FCC" or "Commission") Notice of Inquiry ("NOI") in the above-captioned proceeding.¹

I. Introduction

Circuit City is a national retailer of consumer electronics and information technology products. Circuit City and other retailers have been frustrated in their efforts to overcome 50 years of monopoly control by cable providers over the gateway for offering services and consumer electronics devices to customers served by cable operators. This proceeding represents a vital and integral step in achieving competitive entry. Service and device competition must go hand in hand.

Circuit City demonstrated in the Commission's Advanced Services proceeding,² that achieving competitive entry as to data and entertainment services delivered over the cable industry's broadband infrastructure is vital to the market

¹ *In the Matter of Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, GEN Docket No. 00-185, Notice of Inquiry (Rel. Sept. 28, 2000).

² *In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, CC Docket No. 98-146.

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for broadband communications devices, as well as services. The Commission has persisted in a wait-and-see attitude.³ It should now be evident that control over the services gateway is supporting continued domination of the market for devices, as well as chilling service competition.

II. Cable Operators That Provide Internet-Based Services Over Their Cable Systems Should be Classified as Telecommunications Carriers Providing Common Carrier Services

In the NOI, the Commission asks how it should classify cable modem services and platforms for purposes of reviewing and applying open access requirements.⁴ The Commission should make its regulatory classification based on the nature of the service being provided.

The Communications Act defines “telecommunications” as “the transmission, between or among points specified by the user, of information of the user’s choosing, without change in the form or content of the information as sent and received.”⁵ A cable operator transmitting data and providing Internet services over its own transmission facilities clearly satisfies the transmission function of the definition. The remainder of the definition is met because cable Internet subscribers choose what information to view and do so without a change in the form or content of the information. Similarly, cable operators providing data transmission capability over their cable systems provide “telecommunications service,” which is now defined as “the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available

³ NOI ¶ 4.

⁴ NOI ¶ 15.

⁵ 47 U.S.C. § 153(43) (1996).

directly to the public, regardless of the facilities used.”⁶

The Commission and the courts have recognized that “[a] telecommunications service is a telecommunications service regardless of whether it is provided using wireline, wireless, cable, satellite, or some other infrastructure.”⁷ Rather, the classification depends upon “the nature of the services being offered to customers.”⁸

Accordingly, the mere fact that cable operators provide high speed data transmission over coaxial and fiber optic cable does not preclude their classification as telecommunications carriers providing telecommunications services. The transmission of data by cable operators, from a source controlled by others, is a basic telecommunications service. Cable operators’ provision of those services must be regulated under Title II of the Communications Act. Accordingly, cable operators must unbundle basic transmission capabilities from any enhanced services they offer and must provide adequate transmission capability to allow competing Internet access and online service providers access to the high-speed cable network.

The FCC has a duty to promote competition where it is being stifled. Congress explicitly sought, in the Telecommunications Act of 1996, both deregulation and competition.⁹ Neither can be achieved without an open, competitive market for broadband services. The Commission should use the regulatory tools at its disposal to eliminate cable industry practices that stifle consumer choice and competition.

⁶ 47 U.S.C. § 153(46) (1996).

⁷ See, e.g., *AT&T Corp. v. City of Portland*, 216 F.3d 871 (9th Cir. 2000); *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, *Report to Congress*, ¶ 59 (Apr. 10, 1998).

⁸ *Id.*

⁹ See The Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (purpose of the Act is to “promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers”).

III. Open Access Would Further Competition In Navigation Devices

As Circuit City has demonstrated in other pending proceedings,¹⁰ cable industry domination over the provision of programming to consumers has erected barriers to entry, into the device market, by retailers. Cable operators, taking the position that they already "own" the customer, have little or no incentive to engage retailers to market their services along with cable navigation devices. At the same time, because these operators control hundreds or thousands, or millions, of customers for analog cable services for whom DBS competition is not a realistic option,¹¹ these operators – as they freely admit in the navigation device proceeding – charge monopoly rents for obsolete analog navigation devices, so as to subsidize distribution of devices of their own distribution, but have not made similar offers to competitive retail entrants.

Common carrier status for the broadband "data pipe" is crucial to breaking this competitive stranglehold. In the hands of competitive providers, free to provide whatever sorts of data the market demands, the broadband data pipe would become a potential competitor, through the provision of entertainment services over the Internet.¹² Cable operators would then be obliged to compete for the continuing trade of their own customers, through competitive efficiency in all phases of marketing and distribution, rather than relying on monopoly in some

¹⁰ See Circuit City Comments filed November, 15, 2000, *In the Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices*, CS Docket No. 97-80, *Further Notice of Proposed Rulemaking and Declaratory Ruling* (Rel. Sept. 14, 2000).

¹¹ For many customers, the situational requirements for satellite reception rule it out as a viable option.

¹² See, *Studios in Talks to Sell Movies on the Web*, The Standard.com (Nov. 30, 2000); *Studios Look at Delivering Films Over High-Speed Internet Links*, Wall St. Journal (Nov. 30, 2000).

sectors to subsidize inefficiency in others.

The FCC needs to recognize, by facilitating broadband competition, that "bits are bits." Competition arriving over the broadband data pipe is, potentially, a great equalizer in deconstructing 50 years of bundled device/service monopoly. It seems dramatically unlikely that this would be accomplished through each cable operators' selecting one or two ISPs to "compete" with them. What is the chance that a monopolist, in selecting its own competitors, will allow full, free, and fair competition with its own monopoly over providing entertainment services down the broadband pipe?

The potential for providing entertainment over the data pipe is vast. The Internet is precisely the sort of network that allows such entertainment to arrive from sources not under the control over the cable operator.¹³ Operators should, of course, be entitled to a fair return on their investment in the pipe, and to every opportunity to exploit this pipe themselves, through navigation devices (provided either by MSOs or by competitive entrants) that have been specialized for this purpose. What they should not be entitled to is a continuing monopoly position that stifle competition in *both* the ISP and navigation device markets.

The FCC has acknowledged, and it is now well accepted, that some form of cable open access is technologically possible.¹⁴ It is time for the Commission to comply with Congress's intentions, in the 1996 Act, to *assure* opportunities for competitive entry, by removing the remaining chokepoints.

¹³ *Id.*

¹⁴ NOI ¶ 47.

IV. Cable Industry Control Over Broadband Services Is Increasing and Is Unabated By Competitive Forces

In its previous comments, Circuit City warned that, without open access to cable broadband networks, there was a danger that cable operators would create a new "local loop" monopoly for broadband services. Circuit City predicted that cable operators, by not permitting high-speed network access to competing Internet service providers, would be in the enviable position of occupying a bottleneck position that would allow the industry to dominate access to broadband data networks and control subscriber access to newly-developing services.¹⁵ Finally, Circuit City foresaw that Internet access and online service providers would face a competitive threat to their ability to reach end users. These forecasts are now reality.

While broadband deployment and high-speed Internet services and capabilities have generally evolved across a variety of technology platforms, the most significant growth has been achieved in the cable sector.¹⁶ Unfortunately, this growth has been accompanied by cable system bundling arrangements that

¹⁵ The cable industry has tried to refute this concern in the past by arguing that it was premature to suggest that the cable industry could establish a broadband bottleneck that would prevent customers from gaining access to ISPs. See NCTA Advanced Services Comments. As Circuit City pointed out two years ago and the facts bear out today, cable operators are the only entities controlling the market for Internet-based services delivered over cable systems and they are controlling it with great success. The outcome of the alternative scenario then predicted by Circuit City, in which cable operators remain unregulated in the broadband environment, has come to pass in a current market where cable operators enjoy increased market power derived from their free reign to discriminate and deny access to ISPs. See Circuit City Advance Services Reply Comments at 5-6.

¹⁶ See, e.g., *FCC Sees Growth In Advanced Services, Wireless Deployment*, Warren's Cable Regulation Monitor (Aug. 14, 2000); Statement of Rep. John Dingell, Hearing of the Telecommunications, Trade and Consumer Protection Subcommittee of the House Commerce Committee On Broadband Technologies (May 25, 2000) (saying "A recent FCC report shows that the cable modem currently has a significant advantage in terms of market penetration. While it is still without question a nascent market ... the fact is that the cable companies now command more than a 90 percent share of residential broadband market.").

preclude subscribers from accessing alternative Internet service providers, require subscribers to pay for services they do not need or intend to use, and limit consumer use of features and functions embedded in consumer electronics and information technology.

Consumers are enjoying only a fraction of the benefits that would normally stem from the network and equipment advances seen over the last several years. Cable systems now have two-way, interactive broadband systems with capacities of 750 MHz or more. This enables cable operators to offer a broadband platform for transmitting large amounts of digital information, including voice, data, graphics, and video, at high speeds.¹⁷

Consumers have the ability to connect to the cable infrastructure with a product that is nationally portable.¹⁸ Yet consumers are being shortchanged by their inability to access content and services unless sanctioned by the cable system operator.¹⁹ As in the case of incumbent local exchange carriers that are required by the 1996 Act to open their networks and relinquish their local loop monopolies,

¹⁷ Circuit City notes that, as regulated entities, cable system operators are recovering their system upgrade costs through subscriber rates. It seems only fair that these subscriber-funded networks should be open to competitive and complementary service providers so that subscribers get more value for their investment.

¹⁸ Circuit City believes that while cable modems support valuable services, nationally portable navigation devices promise to bring even greater consumer benefits. Consequently, the Commission's cable open access policy should not rest solely on the competitive availability of cable modems. Vibrant competition in the access to services carried over the cable infrastructure will only exist when consumers can attach a wide variety of consumer electronics equipment and information technology to any cable system nationwide and enjoy the full menu of services, features and functions available from the cable system operator and other service providers.

¹⁹ Cable operators currently control network hardware and software required to provide access to broadband Internet-based products and services. No viable, alternative facility exists for competitive ISPs to provide a similar access network, and it would be prohibitively expensive for competitive ISPs to construct their own network access facilities. By allowing incumbent cable monopolists to deny others access to their broadband capacity, the Commission perpetuates the lack of competition.

cable operators should be forced to open their broadband networks and provide competitive access.

V. Conclusion

Given its use of customer control to frustrate competitive entry into the navigation device market, it is more urgent than ever that the Commission enact rules enabling competition for the provision of broadband data (including, potentially, entertainment) services under Title II of the Communications Act.

Respectfully submitted,

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